FILED
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(11)

No. 05-381

# In the Supreme Court of the United States

WEYERHAEUSER COMPANY, PETITIONER

*v.*

ROSS-SIMMONS HARDWOOD LUMBER COMPANY, INC.

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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## QUESTION PRESENTED

Whether a plaintiff alleging that a defendant engaged in "predatory bidding" constituting anticompetitive conduct for purposes of Section 2 of the Sherman Act, 15 U.S.C. 2, must prove that the defendant suffered a loss in the short term and that it had a dangerous probability of recouping its loss in the long term.

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## BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

This brief is filed in response to the Court's invitation to the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be granted.

### STATEMENT

1. Petitioner and respondent operated sawmills in the Pacific Northwest. The predominant hardwood species in that region is red alder. Petitioner and respondent purchased alder sawlogs from timberland owners and loggers and processed them into hardwood lumber, which is used primarily for finished goods such as furniture and cabinetry. Sawlogs represent approximately 75% of a sawmill's total cost in producing alder lumber. Because alder sawlogs degrade quickly and are difficult (and expensive) to transport, alder sawmills typically operate within 100 miles of their sources of timber. Pet. App. 2a-3a; Br. in Opp. 8; Stipulated Facts paras. 9, 14.

Respondent was a pioneer in the alder lumber business and began operating an alder sawmill in Longview, Washing-

ton, in 1962. Petitioner, one of the world's largest manufacturers of hardwood lumber, entered the Pacific Northwest alder lumber business in 1980, and now operates six alder sawmills in the region. During the relevant period, petitioner's share of the Pacific Northwest market for alder sawlogs was approximately 65%; petitioner's share of North American sales for all hardwood lumber, however, was less than 3%. Pet. App. 3a; C.A. E.R. 405.

From 1998 to 2001, the price of alder sawlogs increased, while the price of hardwood lumber decreased. As the margin between those prices narrowed, a net total of 27 alder sawmills in the Pacific Northwest, including respondent's, became unprofitable and closed. Pet. App. 3a, 23a n.57.

2. After closing its plant, respondent brought suit against petitioner in the United States District Court for the District of Oregon, contending, *inter alia*, that petitioner had engaged in monopolization and attempted monopolization of the Pacific Northwest alder sawlog market, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2. Specifically, respondent alleged that petitioner had engaged in four types of anticompetitive conduct for purposes of Section 2: "(1) predatory overbidding (i.e., paying a higher price for sawlogs than necessary); (2) overbuying (i.e., buying more sawlogs than it needed); (3) entering [into] restrictive or exclusive agreements with sawlog suppliers; and (4) making misrepresentations to state officials in order to obtain sawlogs from state forests." Pet. App. 3a-4a.

After a two-week trial, the case was submitted to the jury. The district court instructed the jury that, in order to prevail on its monopolization or attempted-monopolization claims, respondent was required to prove that petitioner had engaged in anticompetitive conduct. The court defined "anticompetitive conduct" generally as "conduct that has the effect of wrongly preventing or excluding competition." Pet. App. 14a

n.30. The court noted, however, that "[n]ot everything that enables a company to gain or maintain a monopoly is anti-competitive," and further advised the jury that, in deciding whether conduct is anticompetitive, it should consider "whether the conduct lacks a valid business purpose, or unreasonably or unnecessarily impedes the efforts of other firms to compete for raw materials or customers, or if the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition." *Id.* at 3a-4a, 14a n.30, 28a; C.A. E.R. 568, 575.

With reference to respondent's "predatory bidding" and "overbuying" claims, the court instructed the jury as follows:

> One of [respondent's] contentions in this case is that [petitioner] purchased more logs than it needed or paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price. If you find this to be true, you may regard it as an anti-competitive act.

Pet. App. 7a n.8, 14a n.30. Petitioner objected to that instruction on the ground that respondent's claims were analogous to a claim for predatory *pricing*, in which a plaintiff must show that a defendant engaged in below-cost pricing in the short term and had a dangerous probability of recouping its losses in the long term. See *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993). The district court, however, overruled that objection. C.A. E.R. 417-425.

The jury found that petitioner had engaged in monopolization and attempted monopolization and awarded respondent $26.3 million in damages, which the district court trebled to $78.8 million. Pet. App. 4a.[1] The district court then denied

[1] The jury, however, rejected respondent's claim that petitioner had engaged in monopolization or attempted monopolization of the market for finished alder lumber, finding that there was no distinct market for *alder* lumber (as opposed to hardwood lumber generally). C.A. E.R. 581-582.

petitioner's motions for judgment as a matter of law and for a new trial. *Id.* at 28a-46a.

3. The court of appeals affirmed. Pet. App. 1a-27a.

At the outset, the court of appeals framed the question presented as "whether the prerequisites set forth in [*Brooke Group*] for establishing liability in sell-side predatory pricing cases apply in cases where a defendant engages in buy-side predatory bidding by raising the cost of inputs." Pet. App. 5a. The court concluded that "*Brooke Group* does not control in the buy-side predatory bidding context at issue here." *Ibid.*

The court of appeals acknowledged that "[the] [a]ntitrust laws are * * * concerned with competition on the buy-side of the market as much as on the sell-side of the market," because "[b]oth sides of the market affect allocative efficiency, and hence consumer welfare." Pet. App. 6a. The court explained that, in *Brooke Group*, this Court had "established a high liability standard for sell-side predatory pricing cases because of its concern with the facts that consumers benefit from lower prices and that cutting prices often fosters competition." *Id.* at 8a. And the court noted that, "in buy-side predatory bidding cases, as in sell-side predatory pricing cases, the price level itself is the anticompetitive weapon." *Ibid.*

The court of appeals nevertheless concluded that predatory-*bidding* cases were distinguishable from predatory-*pricing* cases because "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 9a. In the short term, the court reasoned, when a firm "pays more for materials * * * and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases," "[n]o consumer benefit results during this predation period if the firm raises or maintains the same price level for its finished products." *Id.* at 9a-10a. The court therefore concluded that "the concerns the *Brooke Group*

Court expressed about depriving consumers of the temporary benefit of low prices do not necessarily apply when predatory bidding is at issue." *Id.* at 10a. And in the long term, the court reasoned, when a firm seeks to "recoup the higher costs it had paid for its materials," "[t]he firm would have little incentive to pass on the benefit of lower input prices to consumers when it possessed greater market power and needed to recoup the higher costs it had paid for its materials." *Id.* at 10a-11a. The court thus concluded that "the overall effect of a predatory bidding scheme would result in harm to consumers." *Id.* at 11a.

The court of appeals recognized that, in some situations, "rising input prices might encourage new companies to enter the supply side of the market and expand output, thereby increasing innovation and efficiency so that consumers benefit in the long run through price decreases and product improvements." Pet. App. 11a. Because "[t]he nature of the input supply at issue here does not readily allow for market expansion," however, the court reasoned that, "at least in this case, predatory bidding is less likely than predatory pricing to result in a benefit to consumers or the stimulation of competition." *Ibid.* The court thus determined that "the high standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding in a relatively inelastic market, not predatory pricing." *Ibid.*

Based on that determination, the court of appeals sustained the district court's instructions, which required the jury to find merely that petitioner "paid a higher price for logs than necessary, in order to prevent [respondent] from obtaining the logs [it] needed at a fair price." Pet. App. 7a n.8, 13a-14a. The court rejected petitioner's assertion that the jury should have been instructed "that overbidding for sawlogs could be anticompetitive conduct only if [petitioner] operated at a loss and a dangerous probability of [petitioner's]

recoupment of its losses existed." *Id.* at 13a. In the court's view, "[t]he instructions as a whole provided sufficient guidance regarding how to determine whether conduct was anticompetitive." *Id.* at 13a-14a.

The court of appeals also determined that substantial evidence supported the jury's verdict on respondent's attempted-monopolization claim, finding "substantial evidence of overbidding for sawlogs to support the jury's finding of anticompetitive conduct." Pet. App. 17a. The court did not analyze respondent's other theories of liability because "the evidence of predatory overbidding sufficiently supports the finding that [petitioner] engaged in anticompetitive conduct." *Id.* at 18a. The court also determined that there was sufficient evidence that petitioner had acted with specific intent to eliminate competition, *id.* at 18a-20a, and that there was a dangerous probability that petitioner would achieve monopoly power in the Pacific Northwest alder sawlog market, *id.* at 20a-25a. Finally, the court upheld the jury's damages award, *id.* at 25a-26a, and the district court's award of attorney's fees and costs, *id.* at 27a.

## DISCUSSION

The court of appeals mistakenly held that a plaintiff can establish "predatory bidding" in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, simply by persuading a jury that the defendant purchased an essential input at a higher price than "necessary," for the purpose of preventing competitors from obtaining that input at a "fair" price. The economic and prudential concerns that this Court has articulated in determining the standard governing claims for predatory *pricing* are generally applicable to claims for predatory *bidding* as well. The court of appeals thus erred in holding that a plaintiff alleging predatory bidding need not show that the defendant suffered a loss in the short term or that it had a danger-

ous probability of recouping its loss in the long term. The court of appeals compounded its error, moreover, by approving an instruction that would allow a jury to base its verdict on subjective assessments of factors such as "fairness" and "necessity."

The court of appeals' decision threatens to chill procompetitive conduct by companies that bid aggressively in order to ensure access to inputs or to increase their output. In addition, the court's explicit approval of a subjective and standardless test for Section 2 liability is inconsistent with this Court's Section 2 decisions more generally, which have emphasized the need for objective standards in order to foster robust competition. Certiorari is therefore warranted.

### A. The Court Of Appeals Erred By Upholding The Jury Instruction On Respondent's "Predatory Bidding" Claim

1. In order to prevail on a claim for monopolization or attempted monopolization under Section 2 of the Sherman Act, a plaintiff must prove, *inter alia*, that the defendant has engaged in anticompetitive conduct. See, *e.g.*, *Verizon Communications, Inc.* v. *Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458-459 (1993); *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605 (1985). Conduct is anticompetitive, in turn, when it tends to exclude competition "on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605 (citation omitted).

In *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), the Court provided more specific guidance with regard to a particular form of potentially anticompetitive conduct: aggressive price-cutting by the seller of a product.[2] The Court rejected the proposition that it would

[2] Although *Brooke Group* involved a claim for primary-line price discrimination under the Robinson-Patman Act, 15 U.S.C. 13(a), the Court

be sufficient for a plaintiff alleging predatory pricing to show simply that the defendant lowered its prices in order to injure or exclude rivals. Instead, the Court ultimately held that a plaintiff alleging predatory pricing must prove that (1) "the prices complained of are below an appropriate measure of its rival's costs," *id.* at 222, and (2) "the competitor had * * * a dangerous probability[] of recouping its investment in below-cost prices," *id.* at 224.

In formulating that more specific rule for defining anti-competitive conduct in the predatory-pricing context, the Court was guided by several principles. With regard to the below-cost-pricing prong of its rule, the Court acknowledged that "[l]ow prices benefit consumers regardless of how those prices are set." *Brooke Group*, 509 U.S. at 223 (quoting *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 340 (1990)). In addition, the Court reasoned that, at least when a company sets its price above the cost of its product, a low price often "reflects the lower cost structure of the alleged predator, and so represents competition on the merits." *Ibid.* A rule that imposed liability even when a company engages in *above*-cost pricing, the Court concluded, could conceivably "render illegal any decision by a firm to cut prices in order to increase market share." *Ibid.* (quoting *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986)). With regard to the recoupment prong of its rule, the Court reasoned that "[r]ecoupment is the ultimate object of an unlawful predatory pricing scheme," because "it is the means by which a predator profits from predation." *Id.* at 224. The Court noted that

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made clear that the "essence" of that claim was identical to that of a predatory-pricing claim under Section 2 of the Sherman Act: namely, whether "[a] business rival has priced its products in an unfair manner with an object to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." 509 U.S. at 222.

unsuccessful predatory pricing produces *lower* aggregate prices in the market, thus *enhancing* consumer welfare. *Ibid.*

In *Brooke Group*, the Court expressly recognized that its rule might permit some price-cutting that would otherwise constitute anticompetitive conduct (insofar as it would exclude rivals on a basis other than efficiency). Specifically, the Court observed that above-cost pricing could sometimes be used to "induce or reestablish supracompetitive pricing," 509 U.S. at 224, and implicitly acknowledged that, even absent recoupment, below-cost pricing could allow a predator to establish short-term market power by injuring and driving out its rivals (until new competitors entered the market and drove the market price back down), *id.* at 224-225; see *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 589 (1986).

The Court concluded, however, that such predatory pricing would be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate price cutting." *Brooke Group*, 509 U.S. at 223. Relatively few instances of truly anticompetitive pricing conduct would escape condemnation under its test, the Court indicated, because "predatory pricing schemes are rarely tried, and even more rarely successful." *Id.* at 226 (quoting *Matsushita*, 475 U.S. at 589); see *id.* at 223. On the other hand, to the extent that a less rigorous approach would impose liability in cases involving procompetitive pricing conduct, "the costs of [such] an erroneous finding of liability are high," *id.* at 226, because it would "chill the very conduct the antitrust laws are designed to protect," *ibid.* (internal quotation marks and citation omitted). And the risks of such "false positives" would be substantial, the Court explained, because "[t]he mechanism by which a firm engages in predatory pricing—lowering prices—is the same mechanism by which a firm stimulates competition." *Ibid.* (internal quotation marks and citation omitted).

2. This case involves an allegation of "predatory bidding" by the *buyer* of a product in an input market. The court of appeals expressly held that *Brooke Group* "does not govern" in the context of "predatory bidding." Pet. App. 13a. The court thus concluded that the district court properly refused to instruct the jury that petitioner's bidding conduct could be treated as anticompetitive only if respondent proved that (1) petitioner suffered a short-term loss as a result of its allegedly higher bid prices, and (2) there was a dangerous probability that petitioner would recoup its loss in the long term. That conclusion was erroneous.

At the outset, the court of appeals correctly noted that, "[i]n a predatory bidding scheme, a firm pays more for materials in the short term, and thereby attempts to squeeze out those competitors who cannot remain profitable when the price of inputs increases," with the expectation that, "[i]n the long run," the firm will be able to "recoup the higher costs it had paid for its materials" through lower input prices. Pet. App. 9a-10a. "Predatory bidding" by a buyer is therefore simply the flipside of "predatory pricing" by a seller. Cf. *Khan* v. *State Oil Co.*, 93 F.3d 1358, 1361 (7th Cir. 1996) (Posner, J.) (noting that "monopsony pricing * * * is analytically the same as monopoly or cartel pricing and so treated by the law"), rev'd on other grounds, 522 U.S. 3 (1997). Both types of behavior involve the manipulation of prices for the purpose of "eliminating competitors in the short run and reducing competition in the long run." *Cargill*, 479 U.S. at 117.

Although the court of appeals recognized that, "in buy-side predatory bidding cases, as in sell-side predatory pricing cases, the price level itself is the anticompetitive weapon," it sought to distinguish predatory bidding from predatory pricing on the ground that "benefit to consumers and stimulation of competition do not necessarily result from predatory bidding the way they do from predatory pricing." Pet. App. 8a-

9a. In the short term, the court explained, "[n]o consumer benefit results * * * if the firm raises or maintains the same price level for its finished products." *Id.* at 10a. Although the court recognized that downstream consumers might *temporarily* benefit during the predation period (if the firm simultaneously pays more for inputs and lowers prices in the output market), the court reasoned that such lower prices may actually be *undesirable*, to the extent that the predator's competitors would be forced to pay higher prices for the relevant input while simultaneously receiving less revenue in the output market. *Ibid.* And in the long term, the court reasoned, downstream consumers would likely not benefit either, insofar as the predator would likely not pass on the benefit of lower prices and could instead "charg[e] consumers a higher price" in order to "recoup the higher costs it had paid for its materials." *Ibid.*

The court of appeals' analysis suffers from at least two fundamental flaws. First, to the extent that the court focused on harm to consumers resulting from increased prices in the output market, the court's analysis necessarily rests on unstated assumptions about a market that it did not even analyze. Specifically, it seemed to assume that the defendant's bidding conduct would confer significant market power in the output market, because absent such market power the defendant would be unable meaningfully to affect prices in that market. See *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 464 (1992). The jury in this case, however, made no finding of market power in the output market. To the contrary, it found that the sale of finished alder lumber did not constitute a distinct market, and the record reflects that petitioner accounted for less than 3% of North American sales for all hardwood lumber. C.A. E.R. 405, 581-582. More generally, the theory of predatory bidding is that recoupment will occur primarily through the exercise of monopsony power

in the input market to lower prices of inputs in the long run. Some portion of those savings might even be passed on to consumers in the output market, but in all events, the court of appeals' reliance on the potential harm to consumers from increased prices in the output market was misplaced.

Second, the court of appeals simply ignored the effects on sellers in the *input* market. Those sellers unambiguously benefit from higher prices in the short term, and they will suffer in the long term only if recoupment succeeds. The Sherman Act "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers"; to the contrary, "[t]he Act is comprehensive in its terms and coverage, protecting all who are made victims of * * * forbidden practices[,] by whomever they may be perpetrated." *Mandeville Island Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).[3] Moreover, just as lower prices for outputs are often a sign of competition, so too are higher input prices, which could reflect a buyer's efficiency or effort to identify high-quality suppliers. Antitrust liability premised on such activity, without evidence of losses and a dangerous prospect of recoupment, could chill substantial legitimate competitive activity. Although the court of appeals acknowledged that the antitrust laws protect competition among sellers, see, *e.g.*,

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[3] Thus, the Department of Justice prosecutes bid-rigging cartels aimed at suppressing competition among buyers under Section 1 of the Sherman Act, 15 U.S.C. 1. See, *e.g.*, *United States* v. *Giordano*, 261 F.3d 1134, 1135-1137 (11th Cir. 2001); *United States* v. *Romer*, 148 F.3d 359, 363 (4th Cir. 1998), cert. denied, 525 U.S. 1141 (1999); *United States* v. *Champion Int'l Corp.*, 557 F.2d 1270, 1272 (9th Cir.), cert. denied, 434 U.S. 938 (1977). Similarly, the Department of Justice and Federal Trade Commission challenge mergers that threaten anticompetitive effects in the purchasing of inputs under Section 7 of the Clayton Act, 15 U.S.C. 18. See, *e.g.*, Revised Competitive Impact Statement, *United States* v. *Aetna Inc.*, 64 Fed. Reg. 44,953 (1999); Competitive Impact Statement, *United States* v. *Cargill, Inc.*, 64 Fed. Reg. 44,054 (1999).

Pet. App. 6a, 8a, it failed to recognize that the rationales for *Brooke Group*'s stringent standard of proof for predatory-*pricing* claims are generally applicable in the context of predatory-*buying* claims as well.

Thus, prohibiting buyers from making bids at a higher price could undermine desirable competition in the input market, thus harming input sellers, which benefit from higher prices "regardless of how those prices are set." *Brooke Group*, 509 U.S. at 223 (citation omitted). Moreover, the exclusionary effect of an increase in input prices may simply "reflect[] the lower cost structure of the alleged predator, and so represent[] competition on the merits." *Ibid.* A rule that attempted to distinguish precisely between competitive and anticompetitive bidding would be "beyond the practical ability of a judicial tribunal to control without courting intolerable risks of chilling legitimate [conduct]," *ibid.*, particularly because "[t]he mechanism by which a firm engages in predatory [bidding]—[raising] prices—is the same mechanism by which a firm stimulates competition" in the input market, *id.* at 226. And to the extent that there are cases involving anticompetitive bidding which do not involve a short-term loss or a prospect of recoupment, the likelihood of "false negatives" is relatively low because predatory-bidding schemes "are rarely tried, and even more rarely successful," *ibid.* (citation omitted), and a broader rule could lead to "false positives" and thereby "chill the very conduct the antitrust laws are designed to protect," *ibid.* (internal quotation marks and citation omitted).[4]

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[4] See, *e.g.*, Herbert Hovenkamp, *The Law of Exclusionary Pricing*, 2 Competition Policy Int'l 21, 35 (2006) (noting that "[t]he risks of overdeterrence and false positives are equivalent [in predatory bidding cases] to those in predatory pricing cases" and that "claims [of predatory bidding] are even harder to evaluate, magnifying the possibility of error").

Much like a plaintiff alleging predatory pricing, therefore, a plaintiff alleging predatory bidding should generally be required to prove that (1) the defendant suffered a loss in the short term, as determined by the relationship between the defendant's costs (including the allegedly predatory bid price for the relevant input), and the amount of revenue that the defendant received (or expected to receive) for its finished product;[5] and (2) that the defendant had a dangerous probability of recouping its loss in the long term. To be sure, a predatory-bidding claim may involve not only effects on an *input* market (analogous to the effects of predatory pricing on the market for the predator's product), but also incidental effects on consumers in an *output* market. Since each prong of the foregoing test requires consideration of the revenue that the defendant receives for its finished product, however, the test naturally takes into account the latter effects as well as the former, insofar as changes in the amount that the defendant bids in the input market have effects on the price in the output market (and therefore on the defendant's revenue in that market).[6] Because the court of appeals held that a

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[5] Because the jury instruction did not require any finding that petitioner operated at a loss, there would be no need in this case for the Court to specify the exact relationship between cost and revenue that a plaintiff would need to show in order to satisfy the first prong of the *Brooke Group* test as applied in the predatory-buying context. Similarly, in *Brooke Group* itself, the Court left open the analogous question of how to define the "appropriate measure" of cost. 509 U.S. at 222 n.1.

[6] Even if a company engages in predatory bidding for an input, the price of the finished product may not change (either in the short term or in the long term), to the extent that the downstream market remains competitive—and recoupment could therefore occur exclusively through lower long-term input prices. See, *e.g.*, Steven C. Salop, *Anticompetitive Overbuying by Power Buyers*, 72 Antitrust L.J. 669, 676 (2005). In this case, as discussed, the evidence indicated (and the jury effectively found) that the downstream market was competitive. See C.A. E.R. 405, 581-582. As it comes to this Court, therefore, this case does not involve a claim that the

plaintiff need not satisfy either prong of the *Brooke Group* standard in order to prevail on a predatory-bidding claim, its decision was erroneous.[7]

The court of appeals suggested that its rejection of the *Brooke Group* test did not necessarily extend to all predatory bidding cases, stating that "the high standard of liability in *Brooke Group* does not apply here because this case involves predatory bidding *in a relatively inelastic market*." Pet. App. 11a (emphasis added). If supply in the input market at issue is inelastic, it is certainly more likely that a predatory bidder will be able to recoup its losses in the long term, because it is more likely that predatory bidding will cause prices to increase in the short term without significantly increasing supply (thereby facilitating injury to the predator's competitors) and that prices can be forced down in the long term without significantly reducing supply (thereby facilitating recoupment).[8] The same could be said, however, about predatory *pricing* in a case in which *demand* in the consumer market at issue is inelastic. *Brooke Group* did not attach any independent significance to demand elasticity in the predatory-pricing context, instead focusing directly on the likelihood of recoup-

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defendant engaged in monopolization or attempted monopolization of the *downstream* market by engaging in predatory bidding in the *upstream* market. Cf. *Cargill*, 479 U.S. at 114. We express no view here regarding the appropriate test for liability in those circumstances.

[7] The court of appeals did not address respondent's seemingly discrete claim that petitioner had engaged in "overbuying" (*i.e.*, buying more sawlogs than necessary and allowing them to spoil). See Pet. App. 18a & n.42. This case therefore does not present the question of how to analyze such an "overbuying" claim.

[8] On the other hand, it is precisely when supply is inelastic that efforts by relatively efficient firms to expand will lead to an increase in input prices. Thus, the Ninth Circuit's rule will apply the greatest antitrust scrutiny in those markets in which procompetitive expansion is likely to increase input prices and injure competitors (but not competition).

ment, and certainly did not suggest that its two-prong test would be inapplicable in the context of a sufficiently inelastic market. There is no basis for a different approach in the predatory-bidding context.

Indeed, a purported limiting principle based on "relative inelasticity" would be entirely unworkable, as it would entail endless ambiguity and uncertainty. Even if a more objective elasticity criterion could be identified, moreover, the court of appeals' suggested approach would necessitate a complex and costly market-by-market assessment of supply elasticity, frustrating the compelling need for clear and easily administrable rules to govern pricing behavior. Accordingly, there is no justification for refusing to apply the *Brooke Group* standard to a predatory-bidding claim simply because it involves a market with "relatively inelastic" supply.[9]

3. The court of appeals compounded its error in this case by approving an instruction that permitted the jury to find that petitioner had engaged in anticompetitive predatory pricing without any reference to objective standards. Even if *Brooke Group* could be distinguished on the ground that predatory pricing should somehow be treated differently from predatory bidding, the district court's jury instruction would be fatally deficient.

In the Section 2 context, this Court has often recognized "the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Verizon*, 540 U.S. at 408. The Court has noted, moreover, that "[m]istaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.'" *Id.* at 414 (quoting *Matsushita*, 475 U.S.

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[9] In addition, the jury made no factual findings on supply elasticity in the Pacific Northwest market for alder sawlogs, and it appears to be a disputed issue. See Pet. Reply Br. 4 n.3; Campbell Group et al. Amici Curiae Br. 12-13 & nn.4-5.

at 594). Accordingly, the Court has stressed the importance of "avoid[ing] constructions of § 2 which might chill competition, rather than foster it." *Spectrum Sports*, 506 U.S. at 458.

The jury instruction on predatory bidding cannot be reconciled with this Court's Section 2 decisions. That instruction did not require the jury to apply any objective standard that would ensure that the challenged conduct was truly anticompetitive in nature, *i.e.*, that it would "exclude rivals on some basis other than efficiency." *Aspen Skiing*, 472 U.S. at 605 (citation omitted). Instead, the district court instructed the jury that it could find that petitioner had engaged in anticompetitive conduct if petitioner had merely "paid a higher price for logs than *necessary*, in order to prevent [respondent] from obtaining the logs [it] needed at a *fair* price." Pet. App. 14a n.30 (emphases added). That standard is entirely unadministrable and wholly subjective, and fails to provide meaningful criteria for distinguishing legitimate competition from anticompetitive conduct.[10]

Nor were those flaws cured by the jury instructions regarding anticompetitive conduct in general. Those instructions advised the jury that, in deciding whether conduct is anticompetitive, it should consider whether "the conduct lacks a valid business purpose" or if "the anticipated benefits of the conduct flow primarily from its tendency to hinder or eliminate competition," Pet. App. 14a n.30, but there was no suggestion that those generic principles were limitations on the

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[10] See, *e.g.*, *Spectrum Sports*, 506 U.S. at 459 (noting that "[t]he concern that § 2 might be applied so as to further anticompetitive ends is plainly not met by inquiring only whether the defendant has engaged in 'unfair' or 'predatory' tactics"); *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 25 (1st Cir. 1990) (Breyer, C.J.) (asking "how * * * a judge or jury [is] to determine a 'fair price'"), cert. denied, 499 U.S. 931 (1991); 1 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 111d, at 102 (2d ed. 2000) (stating that "'fairness' is a vagrant claim applied to any value that one happens to favor").

specific instruction regarding predatory bidding, *id.* at 7a n.8. Moreover, the general instructions offered no specific guidance on how the jury should determine whether the price paid by petitioner was higher than "necessary," or what would have constituted a price that was "fair" to respondent. And they certainly did not require that respondent prove either short-term losses or likely recoupment, notwithstanding the court of appeals' acknowledgment that, "[i]n the long run, to carry out a predatory bidding scheme successfully, a firm would have to recoup the higher costs it had paid for its materials." *Id.* at 10a.[11] The instructions thus offered the jury no meaningful guidance in determining whether petitioner's bidding constituted procompetitive or anticompetitive conduct.

### B. Further Review Is Warranted Because The Decision Below Threatens To Chill Procompetitive Behavior

There are sound reasons for this Court to grant review in this case, notwithstanding the apparent absence of a square circuit conflict on the standard for predatory-bidding claims.[12]

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[11] The jury *was* instructed that, in order to prevail on its attempted-monopolization claim, respondent was required to prove that "there was a dangerous probability that [petitioner] would achieve its goal of monopoly power in a relevant market." C.A. E.R. 575. It does not necessarily follow from such a finding, however, that petitioner had a dangerous probability of successful recoupment of short-term losses (if any) attributable to predation. In order to recoup its losses, a predator must not only achieve some degree of market power, but must achieve enough market power, and maintain it for long enough, to effectuate recoupment.

[12] Petitioner contends (Pet. 15-16) that the court of appeals' decision "cannot be reconciled" with the Fifth Circuit's decision in *In re Beef Industry Antitrust Litigation*, 907 F.2d 510 (1990), which predated this Court's decision in *Brooke Group*. In *Beef Industry*, the Fifth Circuit rejected a claim of predatory bidding, explaining that "[t]he [plaintiffs] presented no evidence that [defendant] ever paid a predatory price (in this case, a price higher than that which would allow the [defendant] to make a profit." *Id.* at 515. That analysis is in tension with the Ninth Circuit's decision below,

1. This case provides a suitable vehicle for addressing the question whether the *Brooke Group* standard for predatory pricing applies to a claim for predatory bidding. The case was presented to a jury in a two-week trial, so the legal question arises in the context of a complete factual record. The question was fully litigated below: petitioner objected to the district court's instruction on the ground that it should have tracked the *Brooke Group* standard, C.A. E.R. 417-425, and the court of appeals expressly held that "*Brooke Group* does not govern" in this context, Pet. App. 13a. To the extent that respondent also relied on other theories of anticompetitive conduct, the court of appeals made clear that it was not passing on the merits of those allegations, in light of its determination that the jury's verdict on the predatory-bidding claim was supported by substantial evidence. *Id.* at 18a. The question of the appropriate standard for predatory-bidding claims under Section 2 is thus squarely presented in a procedural setting well-suited for resolution by this Court.[13]

2. The decision below threatens to chill procompetitive conduct by firms in a wide variety of markets. Although suc-

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which deemed unnecessary any inquiry into the short-term profitability of the defendant's conduct. The Fifth Circuit did not make clear, however, whether its apparent focus on short-term profitability was limited to "this case," *ibid.*, or was instead intended to state the law governing predatory bidding claims generally. It is therefore unclear whether *Beef Industry* conflicts directly with the decision below.

[13] Although there is no square circuit conflict on the standard for predatory-bidding claims, there is a growing body of academic literature, stimulated in part by this case, that discusses the subject of predatory bidding. See, *e.g.*, Hovenkamp, *supra*, at 35-38 (noting, *inter alia*, that the jury instruction approved in this case constitutes "an antitrust disaster of enormous proportions"); John B. Kirkwood, *Buyer Power and Exclusionary Conduct*, 72 Antitrust L.J. 625, 652-668 (2005); Salop, *supra*, at 709-714; Richard O. Zerbe, Jr., *Monopsony and the* Ross-Simmons *Case: A Comment on Salop and Kirkwood*, 72 Antitrust L.J. 717, 717-725 (2005).

cessful challenges to predatory bidding have to date been rare, any firm that has the power to affect prices in an input market by increasing its purchases (and particularly any firm that is subject to suit in the Ninth Circuit) must now take into account the possibility that less-efficient rivals will be able to obtain treble damages merely by convincing a jury that it paid more than "necessary" for inputs so as to deprive those rivals of a "fair" price. Such a prospect will tend to discourage at least some firms from increasing their output (especially in markets with relatively inelastic supply), and thereby "chill the very conduct the antitrust laws are designed to protect." *Brooke Group*, 509 U.S. at 226.

Indeed, the chilling effect of the court of appeals' decision may extend beyond the context of predatory bidding. To the extent that the court of appeals approved jury instructions that dispensed with any objective standard for distinguishing predation from aggressive competition, the court of appeals' decision encourages the utilization of equally vague and standardless jury instructions in other Section 2 cases, and raises the specter that the court of appeals will disregard, in other contexts, this Court's admonition that "[i]t is in the interest of competition to permit dominant firms to engage in vigorous competition, including price competition." *Cargill*, 479 U.S. at 116 (citation omitted).

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MAY 2006